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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 104

IKE J. DAVIS, ET UX, *Petitioners*

v.

DEXTER BARR, CHAIRMAN, MISSISSIPPI STATE TAX COMMISSION, ET AL., *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Petitioning for a writ of certiorari to the Supreme Court of the State of Mississippi, to review the judgment there affirming dismissal of their bill in Chancery Court to vacate an assessment of State income tax deficiency and to suppress collection thereunder, petitioners show and state,—

OPINION BELOW

The opinion here subject is reported at M (157 So. (2d) 505). Motion for rehearing denial (suggestions of error overruled, under Mississippi practice) is not found reported.

The decree of dismissal, with letter statement of reasons, will be found hereunto annexed as *Appendix "A"* and *Appendix "B"*, respectively.

The opinion below and the order overruling suggestion of error are similarly annexed, as *Appendix "C"* and *Appendix "D"*, respectively.

The request for administrative hearing, pursuant to the opinion below, and its denial, are annexed as *Appendix "E"* and *Appendix "F"*, respectively; similar documents respecting administrative appeal are annexed as *Appendix "G"* and *Appendix "H"*, respectively.

JURISDICTION

The jurisdiction of this Court is invoked under authority of the provisions in *28 U.S.C. Sec. 2101.*

The judgment sought here to be reviewed was dated 18 November 1963, and the order overruling the suggestion of error was dated 13 January 1964; its entry was stayed until a date not more than 90 days from 25 January 1964 by order on that date entered.

QUESTIONS PRESENTED

1. When the State voluntarily destroys an income tax return seasonably filed and fully paid, thereafter undertaking an assessment of deficiency against such return without reference to any returned or omitted income, has the State thus discriminated against the federal rights of equal application of laws and due process, the original return being essential under the tax law to such additional assessment, defense against it or in refund proceedings for recovery?

2. If the assessment in those circumstances be constitutional, were petitioners denied due process or equal protection of laws by judicial refusal to give them access to an impartial hearing in these circumstances?

3. Were petitioners deprived of a federal constitutional immunity and privilege when the decision here subject placed upon them a tax duty not prescribed by the legislature?

STATUTE INVOLVED

The only statute involved is the Mississippi State Income Tax Law—Sec. 9220 Miss. Code 1942, Rec. (1962 Supp. Pages 46-71). The pertinent text from that lengthy statute will be found hereunto annexed as *Appendix "I"*.

The constitutional provisions involved are those found in the Constitution of the State of Mississippi, Sections 14 and 24. The provisions of the Constitution of the United States are involved, particularly the Fourteenth Amendment. Both are published officially in Miss. Code 1942, Rec. Vol. 1 (Pages 143 and 185 for the Mississippi provisions; page 71 for the Federal) annexed as *Appendix "J"* and *Appendix "K"* respectively.

STATEMENT

Petitioners filed their annual State income tax returns for each of the several tax years of 1945-1954 involved here and paid the tax there shown to be due. (R. 4—Complaint, Par. 2; R. 26—Answer, Par. 2) The last return and payment for those several years were accomplished in 1955. Sometime prior to April 5, 1961, all those returns were destroyed by the State tax authorities. (R. 50—Letter of advice from re-

spondent, copied hereinafter as *Appendix "L"* for convenience.) Later, or on June 1, 1961, the destruction was authorized by the State Tax Commission in session. (R. 34—Minutes, copied hereinafter as *Appendix "M"* for convenience.)

Then, and prior to October 16, 1961, respondents issued assessment for additional tax due from the destroyed returns (R. 62—From opinion below) but did so without examination of any of the returns. (R. 27—Answer, Par. 4, 3rd Sentence). Warrant of restraint was issued by respondents as part of the collection processes under the additional assessment. (R. 29—Answer, Par. 6)

This suit followed below and, after removal (from the home county of petitioners to the home county of respondents) general demurrer of respondents was overruled. (R. 24—Decree, copied hereinafter as *Appendix "N"* for convenience.) Respondents filed special pleas to the jurisdiction after answer, and such pleas were overruled. (R. 38—Decree, copied hereinafter as *Appendix "O" for convenience.*) Then, on motion by respondents for *subpoena duces tecum*, opposed by petitioners, the cause was dismissed on ground of failure to exhaust administrative remedies. (R. 52-53—Decree, *Appendix "A"*, *Appendix "B"*)

The appeal resulting in the decision here subject was from that final decree.

The questions of constitutionality were raised in the initial pleadings. (R. 5-6—Complaint, Par. 5) The constitutional questions were not considered by the Chancery Court when dismissing. They again were presented to the Supreme Court of Mississippi (R. 63—Opinion here subject, at its page 2, *Appendix "C"*)

The State Supreme Court did not touch on this issue, except to the extent to be inferred from acknowledgment of judicial relief for unconstitutional laws and reference to judicial relief in lieu of pointless administrative remedies. (R. 76—Opinion, at its page 15, *Appendix "C"*)

AUTHORITY AND REASONS FOR GRANTING THE WRIT

A. The substantial federal question of discrimination against petitioners and their federally protected right to equal protection of the laws and to due process has not been decided by this Court on the fact of additional state income tax assessments against returns voluntarily destroyed by the State. Those whose returns were not so destroyed or assessed enjoy completely a privilege which was denied to petitioners by such acts. *Zucht* v. *King*, 43 S. Ct. 24, 25 (260 U.S. 174, 176), 67 L. ed. 194. (Op. 7)

B. The substantial federal question of due process was decided below in a manner that conflicts with the line of decisions from this Court on such question as related to taxation by the states.

(1) The State Supreme Court has always held that the State income tax laws are to be construed favorably to taxpayers. *Stone, Chairman, State Tax Commission* v. *General Box Co., et al.*, M. (53 So. (2d) 85—Op. 1); *Stone* v. *Reichman-Crosby Co.*, M. (43 So. (2d) 184—Op. 8) appeal dismd.; cert. den. S. Ct. (339 U.S. 917), 94 L. ed. 1342. Also, it has held consistently that State income tax returns are presumed correct and require affirmative showing of error before additional assessment. *Broadhead* v. *Stone*, 218 M. 911 (58 So. (2d) 803).

(2) Similarly, the State Supreme Court has held that a statute of limitations once expired extinguished the right of a tax authority to proceed. *State ex rel. Tully v. Mutual Life Ins. Co. of N.Y.*, 189 M. 830 (198 So. 763), and that a statute of limitations exceeded on face of an action renders the action void. *Lampton-Reid Co. v. Allen*, M. (171 So. 783)

(3) The same Court, with deference, recognized in the decision here subject that direct access to the judiciary, rather than administrative remedies, is available for void assessments or in cases where administrative remedy would be of no avail. (Opinion, *Appendix "C"*, p. 15). And it has so held even where there is an anti-suit statute (discussed in the opinion, at Pages 16-17). *Hayley v. Mississippi Levee Comrs.*, 70 M. 141 (23 So. 580)

(4) The statute (Sec. 9220-25 (2) Miss. Code 1942, *Appendix "I"*) requires additional assessments to be made only in compliance with provisions of that section, namely, examination of the return. It follows that any additional assessment made otherwise is void. Mississippi tax agencies find their authority only in the statute they administer. *Chickasaw County v. Gulf, M. & O. R. Co.*, M. (15 So. (2d) 348) It is cognizable, also, that proceedings in these circumstances would be of no avail because respondents are dedicated to rejection here. Their pleadings and in fact the issuance of distraint testify to their dedication to rejection for this cause.

The decisions of the State Supreme Court having advised petitioners they were not obliged to proceed administratively, petitioners were unconstitutionally trapped to their irreparable harm when the decision

here subject forced them back into administrative channels, but without a weapon (their essential returns having been voluntarily destroyed by the State before making the additional assessment). That state of affairs was decided by the State Court, with deference, in a manner that conflicts with the decision of this Court on the same substantial case. *Brinkerhoff Faris Tr. & Sav. Co. v. Hill*, 50 S. Ct. 451 (281 U.S. 673), 74 L. ed. 1107.

The decision below, with deference, conflicts with the decisions from this Court wherein it has long been held that due process requires a fair hearing at some stage of the proceedings. See, *e.g.*, *Nickey v. Mississippi*, 54 S. Ct. 743 (292 U.S. 393), 78 L. ed. 1323. It is deemed by petitioners to be accepted that they could receive no impartial hearing administratively had they gone in the first instance into administrative channels. An agency which destroys an essential return, makes an additional assessment on such return without reference to statutory requirement and then issues warrants of distraint for the additional account, is not believed to be impartial toward that particular taxpayer.

Even so, petitioners, after the surprising inconsistency between the decision here and all former decisions, sought access to administrative channels. They were denied. (*Appendices "E"-"H"*) Now, they have no forum to hear them, except this Court.

Should petitioners be required to pay this assessment, they could not receive a refund in any action for recovery. They have no way to prove their original returns, since they were destroyed by the State. Such returns are essential for either a defense

against the additional assessment or as basis for its refund if paid. *Grosjean v. American Press Co.*, 56 S. Ct. 444 (297 U.S. 233), 80 L. ed. 660; *cf. Newport v. Tax Comm.*, 219 Wis. 293 (261 N.W. 884), cert. den. 56 S. Ct. 598 (297 U.S. 720), 80 L. ed. 1004; *Phillips v. Dime Trust & Sav. D. Co.*, 52 S. Ct. 46 (284 U.S. 160), 76 L. ed. 2220.

When holding that administrative remedy was exclusive in these circumstances, the Court below, with deference, decided the equal protection and due process questions in conflict with the holdings of this Court that such circumstances as these give taxpayers access to the judiciary initially. *Ogden City v. Armstrong*, 18 S. Ct. 98 (168 U.S. 204), 42 L. ed. 444; *Stanley v. Albany County*, 7 S. Ct. 1234 (121 U.S. 535), 30 L. ed. 1000.

Petitioners pleaded (R. 4—Complaint, Par. 4) that the assessment was undertaken more than three years after the last of the returns was filed. Respondents admitted that fact (R. 27—Answer, Par. 4). The decision below, however (*Appendix "C"* at Page 14) concludes that it was necessary for this defense to plead the 6-year statute found in Sec. 9220-25(4) Miss. Code 1942, Rec. (*Appendix "I"*) rather than that under Sec. 9220-25(1).

Such a construction, with deference, is in conflict with the prior decisions of the Court below and conflicts with the uniform line of decisions from this Court on the federal question of due process involved. *State ex rel. Gully v. Mutual Life Ins. Co. of N.Y.*, *supra*. Making a revivor against the repose of the statute; and against the State inhibition of taxing acts when so reposed, deprived petitioners of due process of law federally protected to them. *Nelson v. Sears, R. & Co.*,

61 S. Ct. 586 (312 U.S. 359), 85 L. ed. 888 (Op. 1); *Greene v. Louisville and N. R. Co.*, 37 S. Ct. 673 (244 U.S. 499), 61 L. ed. 1280; *Delaware, L. & W. R. Co. v. Pennsylvania*, 25 S. Ct. 669 (198 U.S. 341), 49 L. ed. 1977.

CONCLUSION

Petitioners seek only a forum in which they may make their defense against this assessment. They chose the route which their Supreme Court had taught them was open and, really, expected to be used. They were not prepared judicially for the exclusive remedy of this decision, neither were they prepared judicially for the closing of administrative doors by secret acts of the State.

They have suffered irreparably from this new view of the law.

Petitioners believe also that this question of action on returns by State tax authorities after voluntary destruction tends to be national in its effect. They, and taxpayers throughout the states need the benefit of final judicial review with respect to equal protection and due process as substantial federal questions.

Respectfully submitted,

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